ART. VI. — *Report of the Case of John W. Webster, indicted for the Murder of George Parkman, before the Supreme Judicial Court of Massachusetts, including the Hearing on the Petition for a Writ of Error, the Prisoner's Confessional Statements, and Application for a Commutation of Sentence, and an Appendix containing several Interesting Matters never before published.* By GEORGE BEMIS, ESQ., one of the Counsel in the Case. Boston: Little & Brown, 1850. 8vo. pp. 628.

THE book of which we have here given the title, omitting the list of literary and scientific honors and offices appended to the names of the accused and the deceased, has just issued from the press of our indefatigable publishers; and, as will be readily understood from the number of its pages, contains a most elaborate report of one of the most remarkable cases in the annals of criminal jurisprudence. The professional character of the reporter gives abundant assurance that, in undertaking to present "a complete and accurate report of the entire proceedings in the case of Professor Webster, from the time of his arrest, down to the period of his execution," he would sedulously apply to the work, as the preface assures us he has done, "a diligent and anxious desire for accuracy;" and its contents prove that he has "bestowed on it an amount of labor and attention which nothing but the supposed importance of the work could justify." He was one of the able counsel for the government in the case, gave very efficient aid, it is understood, to the learned Attorney-General in its preparation, and unquestionably has had ample opportunity for making a correct report. The work stands not alone, however, but is the last of a series. Daily reports of the trial were issued by the daily press during its progress, and some of them were collected in a pamphlet form immediately upon its close.

A respectable octavo volume, of three hundred and fourteen pages, containing a phonographic report of the trial by Dr. James W. Stone, who sustains a high reputation as a reporter, was issued very soon after its termination, professing to give the charge of the Chief Justice, and the argument of the Attorney-General, as carefully corrected by their authors;

and stating that the arguments of the prisoner's counsel had not been revised by themselves, but assuring the public that the report could be relied upon as substantially correct. The prisoner's counsel, however, soon afterwards, in a card to the public, impugned the accuracy of the report, so far as they were concerned, and gave notice that another report would be prepared; and the present volume comes to us with the statement of the reporter, that "it contains at least a quarter part more evidence in compass given at the jury trial than any other report in print;" — that "His Honor the Chief Justice has also favored him with his charge to the jury, now for the first time written out and revised with care for this publication;" — that "in reference to a statement in the preface of Messrs. Phillips, Sampson & Co.'s phonographic report of the jury trial, that the Chief Justice had 'carefully corrected' his charge for that report, it is proper to say, that when called upon to revise it after it was in print, and preparatory to its being immediately stereotyped, he attempted to correct only some of the most obvious errors it contained, in the imperfect manner in which it was then practicable so to do;" — and, in reference to the arguments of his associates on the jury trial, the reporter says, "that those gentlemen have done him the favor to revise them for the present volume; two of them never having attempted that undertaking with reference to any other report, and the Attorney-General having only partially, and in a very imperfect manner, performed that office with reference to a portion of his addresses to the jury as reported in the phonographic publication just referred to." This may be regarded, therefore, as an official report.

The publication of this volume indicates that the case is one of more than ordinary, even of enduring, interest. Such, no doubt, is the fact, and it is this which commends it to our notice at the present time.

The trial, in the course of its progress, was a cause of intense excitement, extending through the whole length and breadth of the land, and reaching even into foreign countries. Extraneous circumstances may have contributed something to this result. The mysterious disappearance of a gentleman who stood prominent in the city of Boston by reason of his wealth, his connections, and his scientific attainments; the discovery of a portion of his remains in the apartments of the

Medical College occupied by one of the Professors of that Institution, the body being horribly mutilated, and partially destroyed, with the evident purpose of concealing the homicide; and the arrest of that Professor upon a charge of wilful murder, — were circumstances which must naturally excite the public attention. And the proceedings of the coroner's jury, promulgating a formal verdict charging the accused with the crime of wilful murder, while the evidence on which that verdict was founded, contrary to the usual custom, had been taken with closed doors, and was withheld from the public eye; — the published references to the distress of the families of the deceased, and of the prisoner; — the almost continual rumors sent forth through portions of the daily press, and even through pamphlets, some of which were true, and many of which were got up to cater for the eager curiosity which had been aroused, — were among some of the extrinsic means by which the public mind, necessarily much excited by the mere accusation preferred by the coroner's jury, was kept in a most painful state of tension, up to, during, and subsequent to the trial. The attempt to avoid the sentence of the law by a petition for a writ of error for the reversal of the judgment; — the petition for a free pardon, with its solemn asseverations of innocence; — the subsequent confession, with the application for a commutation of the punishment; — and the frequent reference in the newspapers to the habits and conduct of the prisoner, — kept alive the interest in the case, even to the last hours of the wretched man who has paid the forfeit of his life for the crime which he committed, whatever may have been the true nature of the offence.

It is not, however, in the phase of its dramatic interest, tragic and exciting as the drama may have been, that the case presses itself most strongly upon our attention. It is not as it affects the family of the victim, or that of the prisoner, or the connections of either, or in any of its private bearings; or as it might furnish an apt theme for some reflections upon the too common practice of sending forth unfounded statements of new developments, in relation to a case under judicial cognizance; or as a text for a moral or religious discourse; or even in its relation to the much mooted question of the lawfulness or expediency of capital punishment, — that we propose to make it the subject of consideration at the present time.

To the honor of the community be it said, that the excitement, however prolonged and intense, was tempered by a due regard for the majesty of the law and the purity of its administration. However deep the feeling, no popular outbreak threatened to wrest the prisoner, guilty as he was deemed, from the hands of the officers of justice. The community awaited, peaceably if not calmly, the trial of the issue, and the execution of the sentence.

The immediate operation of the crime upon the family of the victim, and its tenfold horror and crushing weight upon that of the criminal, are in a great degree private griefs. Would that the expression of the heartfelt sympathy of the community for both might alleviate their distress!

The moral and religious teachings of the case have formed themes for the pulpit, and will doubtless be further set forth by other pens. And the question of capital punishment has made quite too sorry a figure in the Council Chamber, in connection with the application for a commutation of the sentence, to tempt us to discuss it at the present time in our pages.

The case has a legal interest aside from all these considerations. As one of the *causes célèbres*, it will hereafter be made the subject of frequent reference, and will thus leave its impression upon the administration of justice. The present publication is an evidence of this; for it is very clear that it is not merely to present the arguments of the defendant's counsel in a more perfect form, and the guilt of the criminal in a stronger light, that the volume was prepared. It has its legal outside of "law sheep," as well as its popular binding of cloth; and the legal principles stated in it are of more consequence to the community than the lives of both the individuals whose names are inscribed upon the records of the trial. In saying this, we have no disposition to undervalue either of them.

It is in no spirit of fulsome adulation, nor from any sectional feeling, that we say that the tribunal before which the case was tried is one of the most learned and respectable in the United States. Its reputation is too widely known, and too firmly established, to need any commendation from us. The counsel engaged in the cause were men of unquestioned ability. And of the learned and venerated Chief

Justice, who presided at the trial, it is hardly necessary to say, that if his impartiality was so severe as to lead to the supposition, that in effect he threw the weight of his influence into the scale of the government, the legal doctrines he promulgated are but those which are found in English books generally received as learned treatises, and even as authorities; which had previously been recognized to some extent upon the trial of the Knapps; and which, at a former time, upon the occasion of the trial of York, had the concurrence and sanction of a majority of his brethren.

And yet we are not quite sure that we attain from the reports of this case, (what we certainly have not from the language of the English judges and books, or from the case of York, which preceded it,) a clear understanding of the principle which is made the basis of the implication of malice in the law of felonious homicide, and upon which the case must have turned to a greater or less extent. *Primâ facie*, this might well be supposed to result from some deficiency in our own perceptions; but we shall hope to escape this imputation when we state our difficulties.

The definition of murder, as stated briefly in the case, "is, the killing of any person in the peace of the Commonwealth, with *malice aforethought*, either express or implied by law." p. 456. This is the received description, giving of itself, however, no definite idea of the precise nature of the crime, but leading to an inquiry, what is the nature of the malice thus mentioned; what is to be understood by express malice, and what by implied malice; and under what circumstances the implication of malice is to be made. Waiving for the present any discussion of the nature of implied malice, the first difficulty, to which we have just referred, is this; — when express malice is not shown, upon what state of the evidence is malice to be implied, so that the charge of murder is to be regarded as proved, *primâ facie* at least, and the prisoner put upon his defence? In other words, may the malice, which gives to a homicide the character of murder, be implied from proof of the mere fact that the respondent killed the deceased, or is it to be implied only from evidence showing that the respondent voluntarily committed the deed. Upon this point, we find the learned Attorney-General, in his opening address to the jury, saying, —

"If you are satisfied that Dr. Parkman came to his death, in any manner, by the voluntary act of the prisoner, then the case is to be determined by the rule of law, which we understand to be settled in this Commonwealth, namely, — that a voluntary killing being proved, it is held to be murder, unless there is evidence arising out of the whole case, satisfactory to the jury, upon a preponderance of proof, that the act was committed either in necessary self-defence, or under such provocation as reduces the offence to manslaughter; — the provocation, however, extending to blows, and not consisting in words merely, of however irritating and exasperating a character.

"In other words, we understand it to be the established rule of law, — and I respectfully submit, may it please Your Honors, [here the Attorney-General turned and addressed the Bench,] in a case of *secret* killing, — upon the *unanimous* judgment of this Court, that if a voluntary killing be shown, the presumption of law is, that it is murder, unless the evidence produced by the government, or that furnished by the defendant, proves circumstances of mitigation accompanying the killing, which reduce it to a lesser offence." p. 30.

In the closing argument for the government, the Attorney-General remarks, —

"We rely, may it please Your Honors, upon the well settled principles of the common law, as recognized in this Commonwealth, in the case of *Peter York*, subsequently affirmed by this court in the case of *Washington Goode*, and more recently in that of *William E. Knowlton*. A homicide being proved, unless it appears by a preponderance of the testimony to have been committed under reasonable provocation such as the law recognizes, is presumed to be malicious; and with this presumption, whether express malice is or is not shown, it is murder." And again, — "But if there should be no satisfactory proof of actual premeditation, the law presumes, in the absence of any controlling evidence, that there did exist the implied malice, and it is equally murder." pp. 383, 384.

But we look for an exposition of the principles of the law rather to the charge of the Court to the jury, which upon this point is as follows: —

"Upon this subject, the rule as deduced from the authorities is, that the implication of malice arises in every case of intentional homicide; and, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily established by the party charged, unless they arise out

of the evidence produced against him to prove the homicide, and the circumstances attending it. If there were, in fact, circumstances of justification, excuse, or palliation, such proof would naturally indicate them. But where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed, tending to show justification or excuse, there is nothing to rebut the natural presumption of malice." p. 457.

In verification and illustration of this position, East's Pleas of the Crown is cited, as a work of good authority, and the following extract from Chapter V. is introduced: —

"The implication of malice arises in every instance of homicide amounting, in point of law, to murder; and in every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him." (Sect. 12,) p. 459.

Again it is said, "But where one intentionally and voluntarily destroys the life of another, and there is no mitigating evidence, either in the testimony offered to convict, or in that given in defence, to show heat of blood from adequate provocation or in mutual combat, malice is implied." p. 488.

The phonographic report by Dr. Stone does not relieve us from the difficulty suggested, if difficulty there be. The language of both reports states the implication of malice in both the forms before mentioned, namely, — from proof of an "intentional homicide," and from proof of the mere "fact of killing."

This is, perhaps, still more clearly shown in the case of York, which again is only a repetition in this particular of the language of the English books. In that case, a commendatory reference is made to Sir Michael Foster, as a most acute, discriminating, and exact writer, followed by an extract from his Crown Law, stating the rule in these words: —

"In every charge of murder, *the fact of killing being first proved*, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth." 9 *Metcalf's Reports*, 111, 112.

And after the examination of several other authorities, the conclusion is thus stated: —

"From this view of the immemorial usages of the courts, upon special verdicts, it appears manifest that the fact of killing is *primâ facie* evidence of malice, and unless overcome by preponderating proof the other way, it must be held murder, and judgment go accordingly." p. 115.

Farther on we have other citations upon this particular point from other English books: —

"Lord Hale says, when one voluntarily kills another without any provocation it is murder, for the law presumes it to be malicious and that he is *hostis humani generis*," 1 *Hale's P. C.* 455. In 1 *Hawkins*, c. 31, § 32, it is laid down, that "wherever it appears that a man killed another, it shall be intended *prima facie* that he did it maliciously, unless he can make out the contrary by showing that he did it on a sudden provocation, &c." In 4. *Bl. Com.* 201, it is said, we may take it for a general rule, that all homicide is malicious, and of course amounts to murder, unless where justified, excused, or alleviated, into manslaughter; and all these circumstances of justification, excuse, or alleviation, *it is incumbent on the prisoner to make out* to the satisfaction of the court and jury." 9 *Met. Rep.* 119, 120.

After divers other extracts and references, the learned Chief Justice, speaking for the majority of the court, says: —

"I have thus endeavored to establish the proposition, and it seems to be most abundantly proved, that when the fact of voluntary homicide is shown, and this not accompanied with any fact of excuse or extenuation, malice is inferred from the act; that this is a fact which may be controlled by proof; and if not so proved, it cannot be taken into judicial consideration." 9 *Met.* 121.

But the learned reporter, whose legal erudition has since elevated him to a seat upon the bench, states the principle of the decision in these terms: —

"When on the trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious, and an act of murder, and proof of matter of excuse or extenuation lies in the defendant. Wilde, J. dissenting." 9 *Met.* 93.

This abstract is warranted by the facts of the case.

Now it is very clear that these different forms of phraseology express different propositions, and do not, and cannot, mean the same thing. The principle, as stated in the conclusion of the Chief Justice is more favorable for the prisoner than that stated generally in the books which he cites, — more favorable than the previous rulings in this State, founded on those books.

The fact that one person killed another does not show that he *voluntarily* killed him, without something by way of proof superadded, to show the circumstances attending the homicide. This is quite too clear to need argument. The fact that a very considerable proportion of the homicide which occurs in the world is not committed voluntarily, is well known. This is true not only of the large class of cases where one kills another by accident, in the course of a lawful ordinary business, in which the homicide, being without fault, is excused; but it is true also of another large class of cases, where the homicide is unlawful, but is the result of negligence, without intention, and in fact without any supposition that the party whose death follows was in any danger. In many cases of provocation, where one party kills another when he intended merely to punish him for an aggression, the blow was intentional, but the homicide unintentional.

The proposition of Lord Hale, that "where one *voluntarily* kills another without any provocation, it is murder," or the proposition that "the implication of malice arises in every case of *intentional* homicide," is not substantially the proposition of Sir Michael Foster, that "in every charge of murder, *the fact of killing being first proved*, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him." This clearly excludes the idea of any necessity of proof on the part of the government to show that the homicide was voluntary, in order to raise the implication of malice; and East, who is cited as authority, maintains as clearly the same doctrine, quoting, to a considerable extent, the words of Foster.

It is not merely as a matter of critical learning that we inquire whether these different forms of phraseology express different ideas. It must be of great importance to the accused, in many cases, to ascertain which proposition con-

tains the true principle. The case before us may furnish an illustration. Suppose we are not satisfied, upon the evidence, that Dr. Webster sought the meeting with Dr. Parkman with the design of compassing his death; which is a well founded supposition in relation to many members of the community, and gave rise to what has been called "the Cambridge petition" for the commutation of the punishment; then, if from the mere fact that Dr. Webster killed Dr. Parkman, malice is to be inferred, it was only necessary for the government to show that Dr. Parkman came to his death by the hands of Dr. Webster, in order to make out a *primâ facie* case of wilful murder, through the implication of malice. But if malice is to be implied only from a *voluntary* killing, then that proof is not sufficient, but the government must superadd something to show affirmatively that the homicide was a voluntary act.

It will not do to say that, the fact of killing being shown, the slayer is presumed to have intended to do what he has actually done, and that thus, from the mere fact of killing, we derive, first, the presumption of intention, and then, from that, the implication of malice. We are aware that it is sometimes said, that a man is presumed to intend the consequences of his own acts. But this is said by mere inadvertence respecting the form of the proposition. Taken literally, it would be false in philosophy, and mischievous in law. If it were so, the housewright who makes a misstep upon the roof of the house, and falls to the ground, whereby his neck is dislocated, would be shown to be a suicide, for the fall and the dislocation are the consequences of the previous movement, and that was his own act. The principle is found more definitely stated by the Chief Justice, "that a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts." This is the principle as usually understood, stated with more than ordinary precision; and upon this proposition, in order to show a voluntary killing, it is necessary to prove the means used to have been such as would naturally and probably accomplish the actual result. If, however, we examine this proposition critically, we very much doubt whether its soundness can be maintained, except

with the qualification that the act is of such a nature as that, rightly understood, the consequences were probable to the comprehension of the party who committed it. How can an individual be presumed to have intended consequences resulting from his acts, which seem probable enough when viewed after the fact, but which it does not appear would have been probable results to him, had he reflected upon the subject at the time, or even to any one else who happened to be present. It seems to us clear, therefore, that the presumption of an intentional killing cannot be derived from the mere fact that one party killed another. We must have something beyond, before we draw the conclusion; and of course, if malice is to be implied from a voluntary killing, it is necessary to show something beyond the fact of killing to raise the implication.

It is not necessary to go into an examination of the authorities cited by Sir Michael Foster for the purpose of showing that, taken together, they do not support the proposition he states. It is sufficient for our present purpose that it cannot be maintained upon principle.

We by no means intend to infer, that Dr. Webster did not have the full benefit of the most favorable of the propositions we have been considering; — that the jury did not understand that it was only upon proof of a homicide voluntarily committed by him, that the implication of malice could arise, so as to constitute the crime of murder. But it seems a matter of no small moment, without reference to this case, that it should be definitely settled, from what a presumption of malice is to be raised, that we may have a well known and reliable distinction between murder and manslaughter.

The difficulty we have thus stated, however, is not the only one which attends the examination of the subject. The inquiry arises farther, how is it that malice is to be implied even from a voluntary homicide, without something farther to lead to the inference?

This is an inquiry which leads us back again to the English books. If it should be asked why we are not disposed to rely upon the authority of the English text writers and reports on these questions, as much as upon others, we answer that the principles of the criminal law have not, in our opinion, been so well and fully considered there, as those which

govern the civil rights of parties. We need not go at large into the reasons for this opinion. The fact, that until a comparatively recent date, counsel were not allowed to persons indicted for treason or felony, when the cases were tried upon the general issue; and the fact that no new trials were granted in capital cases, are quite enough to show why we should expect somewhat less of precision in the examination of the principles which should govern such cases, and pay somewhat less of deference to the doctrines promulgated. That "the judge should be counsel for the prisoner," may, in individual instances, be a very good doctrine for the prisoner on trial; but a well reasoned argument oftentimes gives great additional value to the opinion, even when the latter is adverse to, and overrules, the positions which are attempted to be maintained in it. Any one who will take pains to collect the resolutions of the English courts in cases of homicide, and examine the distinctions which have been maintained at different times, will, we think, be satisfied of this. A single instance shall suffice at this time. In Mawgridge's case, the Lord Chief Justice, — after a reference to the resolution of the judges, that no words of reproach or infamy are sufficient to provoke another to such a degree of anger as to strike the provoking party with a sword, or to throw a bottle at him, or strike him with any other weapon that may kill him, but if the person provoking be thereby killed, it is murder, — is reported, and probably with truth, to have said: —

"Therefore I am of opinion, that if two are in company together, and one shall give the other contumelious language, (as suppose A. and B.) A. that was so provoked, draws his sword and makes a pass at B., (B. then having no weapon drawn,) but misses him. Whereupon B. draws his sword and passes at A. And there being an interchange of passes between them, A. kills B. I hold this to be murder in A., for A.'s pass at B. was malicious, and what B. afterwards did was lawful. But if A. who had been so provoked draws his sword, and then, before he passes, B.'s sword is drawn; or A. bids him draw, and B. thereupon drawing, there happen to be mutual passes; if A. kills B. this will be but manslaughter, because it was suddain, and A.'s design was not so absolutely to destroy B. as to combat with him, whereby he run the hazard of his own life at the same time." — *Supplement to Sir J. Kelyng's Rep.* 130.

It may be our misfortune, we hope it is not our fault, that we do not perceive the force of the reason for the difference, or rather that we are inclined to think, that, if there be a difference, it shows why the conclusion should be the other way. It seems to us, that "it was suddain" in the first case, rather than in the other. They are both cases of mutual combat, where the aggression was on the part of him who was slain. In the same case, speaking of malice, the Lord Chief Justice says: —

"By the statute of 5 Hen. 4, if any one out of malice prepensed, shall cut out the tongue, or put out the eyes of another, he shall incur the pain of felony. If any one doth such a mischief on a suddain, that is malice prepensed; for saith my Lord Coke, if it be voluntarily, the law will imply malice. Therefore when a man shall without any provocation stab another with a dagger, or knock out his brains with a bottle, this is express malice, for he designedly and purposely did him the mischief." —*Ib.* 127.

We have no great difficulty in agreeing to the conclusion, because the cases show express malice, and not because, from the mere fact that the acts were voluntary, the law will imply malice. The passage referred to in Coke, is found in the 13th chap. 3 *Inst.* 62. "Of felony for cutting out of tongues and putting out of eyes, &c." where, referring to this statute, 5 H. 4, c. 5, he says, "If any man do cut out the tongue or put out the eyes of any of the king's lieges, of malice prepensed, it is felony;" and makes this commentary: "*Malice prepensed.*] That is, voluntary and of set purpose, though it be done upon a sudden occasion; for if it be voluntary, the law implieth malice." We think if a man does such an act voluntarily, "and of set purpose," there is no need of any implication. In Coke's general description of malice, in the chapter upon murder, he has no such proposition.

We do not intend, however, any sweeping denunciation of the books on criminal law. We shall endeavor, as briefly as possible, to show that a great portion of them sustain our views, and must therefore be admitted by us to contain sound principles.

Homicide has been divided into justifiable, excusable, and felonious, the latter embracing the offences of murder and manslaughter. The definition of murder has already been

stated; its distinguishing characteristic being "malice aforethought, either express or implied."

"Manslaughter," says East, "is principally distinguishable from murder in this, that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter; and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionably lenient." He says, "the cases falling under the head of manslaughter are either, first, where death ensues from actions in themselves unlawful, but not proceeding from a malicious or felonious intention; secondly, from actions in themselves lawful, but done without due care and circumspection for preventing mischief; thirdly, where death ensues from a sudden combat or affray; or, fourthly, from heat of blood upon a reasonable provocation given." 1 *East's P. C.* ch. 5, § 4, p. 218, 219.

The appropriate language of an accusation for a crime of this description, committed upon sudden combat, or from heat of blood, is, as shown by the usual forms of the indictment, that the person committed the act "in the fury of his mind."

Now we think we comprehend how and why the mere fact of the killing of an individual may raise a presumption that the killing was unlawful. The right of existence, the right of life, the right of liberty, the right of property, are rights which the law recognizes and guards; and he who interferes with either, as possessed by another, appears *primâ facie* to be an aggressor, and is put upon his defence. The party who kills the horse of another, or cuts a tree upon his ground, subjects himself to answer for it, as a trespass upon the mere proof of the fact, because the act being, *primâ facie*, an interference with the rights of another, the presumption is, that it was unlawful; and if he have an excuse or justification, he must show it. The party who lays his hands upon the person of another, even the officer who arrests him upon lawful process, appears, until the reason is shown, to have done an unauthorized act. The *primâ facie* evidence, upon the mere proof of the fact, is, that the party has committed a trespass. And, upon similar principles, the individual who takes the life of another, is well presumed to have done the act unlawfully, the *status* of life being the lawful

status of the person slain. But upon what principle is it, that the presumption, from the mere fact of the homicide, or even from the fact of a voluntary or intentional homicide, is, that the slaying is not only unlawful, but that its unlawfulness is of the most aggravated character known to the law? How is it, that the law should not be content with the presumption that the act was unlawful, subjecting the party to the punishment prescribed for manslaughter only, until the addition of some proof tending to show that the deed was of an aggravated character, from which circumstances the implication might well arise? This leads us to a consideration of the nature of the malice aforethought which is implied, and to the character of the presumption through which it is made.

It is said, in some cases, that the malice is an inference of law, to be drawn by the court. By this, however, we suppose it is not intended to assert that the malice inferred is itself matter of law, but only that the inference of the fact of malice is one which the law makes through the agency of the court, instead of through the intervention of a jury inquiring respecting the existence of that fact. There can be no reasonable doubt that express malice is matter of fact, and that is the nature of all malice.

Nearly all the authors who treat of homicide attempt to give definitions or descriptions of malice express and implied; but the descriptions run into each other, and the dividing line between them is certainly not very well defined. Coke, in his chapter on murder, says, "malice prepensed is when one compasseth to kill, or wound, or beat another, and doth it *sedato animo*." As an illustration, he puts the case; — "If two fall out upon a sudden occasion, and agree to fight in such a field, and each of them go and fetch their weapon, and go into the field, and therein fight, the one killeth the other; here is no malice prepensed, for the fetching of the weapon and going into the field, is but a continuance of the sudden falling out, and the blood was never cooled. But if they appoint to fight the next day, that is malice prepensed." 3 *Inst.* 51. Malice implied, he says, is in three cases. "First, in respect of the manner of the deed. As if one killeth another without any provocation of the part of him that is slain, the law implieth malice." (He puts *poisoning* as one of the cases of implied malice, under this head.)

"2. In respect of the person slain. As if a magistrate or known officer, or any other, that hath lawful warrant, and in doing, or offering to do his office, or to execute his warrant, is slain, this is murder, by malice implied by law," &c. "3. In respect of the person killing. If A. assault B. to rob him, and in resisting, A. killeth B. this is murder by malice implied, albeit he never saw or knew him before. If a prisoner by the duress of the gaoler, cometh to untimely death, this is murder in the gaoler, and the law implieth malice in respect of the cruelty." 3 *Inst.* 51, 52. It is very evident that, in this description of Lord Coke, the implication of malice is made from something very different from a mere voluntary destruction of life.

Foster is more explicit respecting the meaning. He says, "When the law maketh use of the term *malice aforethought*, as descriptive of the crime of murder, it is not to be understood in that narrow, restrained sense, to which the modern use of the word *malice* is apt to lead one, *a principle of malevolence to particulars;* for the law by the term *malice* in this instance meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit." He says further, of the use of the words '*per malitiam*' and '*malitiosè*' by "our oldest writers," "they constantly mean an action flowing from a wicked and corrupt motive, a thing done *malo animo, malâ conscientiâ*, as they express themselves."

"The legislature hath likewise frequently used the terms *malice* and *maliciously* in the same general sense, as denoting a wicked, perverse, and incorrigible disposition." Again, "The 4 & 5 Ph. & M. enacteth, 'That every person, that shall *maliciously* command, hire, or counsel any person to do any robbery — and being arraigned shall stand mute of *malice*.' The word in both parts of the act plainly importeth, in general, a wicked, perverse and incorrigible disposition." . . "In the same latitude are the words *malice aforethought* to be understood in the statutes which oust the clergy in the case of wilful murder. The *malus animus*, which is to be collected from all circumstances, and of which, as I before said, the court and not the jury is to judge, is what bringeth the offence within the denomination of wilful, malicious murder, whatever might be the immediate motive to it; whether it be done, as the old writers express themselves, *irâ vel odio, vel causâ lucri*," or from any other wicked or mis-

chievous incentive. And I believe most, if not all the cases, which in our books are ranged under the head of *implied malice*, will, if carefully adverted to, be found to turn upon this single point, that the fact hath been attended with such circumstances as carry in them the plain indications of an heart regardless of social duty and fatally bent on mischief." *Foster's Crown Law*, 255, 257.

Again, in the report of Curtis's case: "And where the circumstances of deliberation and cruelty concur, as they do in this case, the fact is undoubtedly murder; as flowing from a wicked heart, a mind grievously depraved, and acting from motives highly criminal. Which is the genuine notion of malice in our law." *Foster*, 138.

East gives us similar characteristics. In his chapter upon the several kinds of homicide we find: —

"The sense of which word *malice* is not only confined to a particular ill-will to the deceased, but is intended to denote, as Mr. Justice Foster expresses it, an action flowing from a wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of an heart regardless of social duty and fatally bent upon mischief. And therefore, malice is implied from any deliberate cruel act against another however sudden."

For this last proposition he cites Mawgridge's case. We shall not stop here to inquire into the force of the terms "deliberate" and "sudden." His enumeration of the different classes of murder, which follows in the same section, certainly does not include a mere voluntary killing, suddenly committed, without something further to show its character.

"The grosser instances of murder," he says, "where the depravity of the heart or malice above-mentioned is apparent, form the 1st class of cases under this head; 2. Where an officer, or one who assists in the advancement of justice where he lawfully may, is killed in the regular discharge of his duty; 3. Where a private man, lawfully interfering to prevent a breach of the peace, is opposed in such his endeavor, and slain; 4. Where death happens incidentally in the prosecution of some other felony; 5. Where it happens from other unlawful acts, of which death was the probable consequence, done deliberately, and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately fall where it may, though the death ensue against or beside the original intent of the party; 6. From deliberate duelling." 1 *East's P. C.* ch. v. § 2.

Hale, in relation to implied malice, follows the arrangement of Coke. "Such a malice, therefore, that makes the killing of a man to be murder is of two kinds: 1. Malice in fact; or 2. Malice in law, or *ex præsumptione legis.*" "Malice in law, or presumed malice, is of two kinds, namely, — 1. In respect of the manner of the homicide, when without provocation; 2. In respect of the person killed, namely, — a minister of justice in the execution of his office; 3. In respect of the person killing." But his description of malice in fact may serve to show what kind of circumstances are evidence of malice. "Malice in fact is a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized. The evidences of such a malice must arise from external circumstances discovering that inward intention, as lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like, which are various according to variety of circumstances." *Hale's P. C.* ch. 36, p. 450.

Another writer of acknowledged reputation states, "It is to be observed that any formed design of doing mischief may be called malice; and therefore, that not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that show the heart to be perversely wicked, is adjudged to be of malice prepense, and consequently murder." *Hawk. P. C.* ch. 13, § 18.

Russell condenses the language of Foster and describes malice as meaning, "that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty and deliberately bent upon mischief." And having said that "express malice is when one person kills another with a sedate, deliberate mind and formed design," seemingly confining it to cases where there was a design to take the life of the party slain, he says, "malice is implied by law from any deliberate and cruel act, committed by one person against another, however sudden," and gives as instances, "where a man kills another suddenly without any or without considerable provocation." "So if a man wilfully poisons another." 1 *Russell on Crimes*, b. 3, ch. 1, p. 482, 483.

From these descriptions, by the best English writers, of

the nature of the malice aforethought, which gives to homicide a character of such fearful import, it seems to us, that while express malice might well be said, in general terms, to denote an unlawful, deliberate design to destroy life, whether of the deceased, or of another, implied malice, unless where there may be a presumption of it in respect of the person of the slain, or of the slayer, is that wanton, reckless disregard of life, which denotes a depraved, vicious, cruel disposition, connected with actual homicide. A large class of cases of homicide, which is referred to in 9 *Metcalf*, 102, where "as the question, whether such homicide be murder or manslaughter, must depend upon the degree of carelessness, cruelty, or malignity, presented by the evidence, depending upon the particular facts and circumstances, the malice must be an inference of fact from those circumstances," — tends very strongly, we think, to support this proposition. And Chief Justice Parsons may be referred to as sustaining it: "The malice is express," said that learned judge, "when there was a premeditated intention to kill. Malice is implied, when the killing is attended with circumstances which indicate great wickedness and depravity of disposition, a heart void of social duty, and fatally bent on mischief." *Selfridge's Trial*, 5. In regard to the inference of malice from the fact of killing he stated the rule as it is generally stated in the English books.

The language of some judges of high standing in England, when considering cases other than homicide, can hardly be considered as giving more accurate descriptions of the nature of malice. Mr. Justice Bayley, in *Bromage* v. *Prosser*, 4 *Barn. & Cres.* 255, and Mr. Justice Littledale, in *McPherson* v. *Daniels*, 10 *Barn. & Cres.* 292, say that malice in its legal sense denotes "a wrongful act done intentionally without just cause or excuse." But if this were so, intentional homicide committed upon the provocation of a blow, or in mutual combat, or in the commission of an unlawful act, without any deliberate intent of doing mischief, must be held to be wilful murder; for the act is without just cause or excuse; unless by excuse is meant mitigating circumstances, which can hardly be its just interpretation in such a connection.

If the English doctrine, that malice is presumed from the

mere fact of killing, be correct, even the latter part of the definition thus given may be omitted; for malice would denote an intentional wrongful act; or rather such an act would denote the malice aforethought necessary to constitute murder.

There is no doubt that the term malice, in its legal acceptation is used in the books with different meanings according to its connection. Mr. Justice Story must have held such an opinion when he said, "In cases of murder, where it" [the term malice] "has acquired a more intense sense; there is an accompaniment, indicative of its being used in that more intense sense; for in such cases there must not only be malice but "malice aforethought;" although he adds, "Yet in strictness of law, the term malice by itself, perhaps, has no more than its usual sense in law even in such cases. 2 *Sumner*, 586, *United States* v. *Taylor*.

We come next to the inquiry, what is the character of the presumption by which the inference of malice is drawn, or in other words, by which malice is implied; which, without going far into the discussion of presumptions, we shall dismiss in a few words.

It is said to be a natural presumption. 9 *Met.* 104.

"Presumptions of law," says Professor Greenleaf, "consist of those rules, which in certain cases either forbid or dispense with any ulterior inquiry. They are founded, either upon the first principles of justice; or the laws of nature; or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. The general doctrines of presumptive evidence are not therefore peculiar to municipal law, but are shared by it in common with other departments of science. Thus, the presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle, of its application. The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed. It is this uniformly experienced connection which leads to its recognition by the law without other proof; the presumption, however, having more or less force, in proportion to the universality of the experience. And this has led to the distribution of presumptions of law into two classes, namely, — *conclusive* and *disputable*." 1 *Greenleaf on Evid.* § 14.

The presumption of malice which we are speaking of is clearly not conclusive. Turning to what is said respecting disputable presumptions, we find that, —

"These as well as the former are the result of the general experience of a connection between facts or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class, is not so intimate, nor so nearly universal, as to render it expedient, that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence." *Ib.* § 33.

Here let us make a remark upon the significance of the word "*deliberate*" in the 14th section. It may serve to show us what we are to understand by a deliberate act however sudden, spoken of by East. It is quite clear that it cannot be rejected from the context, but that it imports some period of reflection, greater or less. The learned Professor, we think, would never assert that the presumption of a malicious intent to kill from the mere use of a deadly weapon, and the presumption of aquatic habits in an animal formed with webbed feet, belong to the same philosophy.

Having thus gone into a very extended examination of the nature of the malice which characterizes murder, and ascertained the principle of the presumption through which it is implied, we ask, how that malice can possibly be implied by a *natural* presumption, even *primâ facie*, leaving the presumption disputable? How is it possible, "upon the first principles of justice, or the laws of nature, or the experienced course of human affairs, conduct, and the connection usually found to exist between certain things;" to deduce and imply from the isolated fact that one person voluntarily killed another, that the act was done under circumstances indicative of "a wicked, depraved, and malignant spirit," or a "wicked, perverse, and incorrigible disposition," or a "heart regardless of social duty and fatally bent on mischief?" Is the connection between a voluntary killing and malice, by whatever description it may be designated, "so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence?"

If one "killeth another without any provocation," we can presume malice; for the natural inference is, that he was actuated by a depraved and malignant spirit, — by a heart fatally bent on mischief. But how are we to infer that there was no provocation, from premises which are, to say the least, equally consistent with its presence as with its absence?

The statutes of several States provide for the punishment of divers malicious trespasses. By those of Massachusetts, he who shall wilfully or maliciously destroy or injure the personal property of another person, may be imprisoned in the State prison; and any person who shall maliciously break down, injure, mar, or deface, any fence belonging to or enclosing lands not his own, may be imprisoned in the county jail. Upon indictments for such offences, would evidence that the defendant threw a stone at the prosecutor's horse, which did him an injury, or that he injured his fence, without some further evidence, furnish even *primâ facie* evidence to support an indictment alleging that he did the act maliciously? It would undoubtedly be sufficient to support an action of trespass, for the reasons heretofore stated.

These are significant questions; and some consideration of them leads us to the conclusion, that if the matter is not to be determined by authority, but is to be decided with regard to the principles upon which presumptions in general are founded, the existence of this fact, *malice*, cannot, naturally and logically be inferred from the proof of that fact, *voluntary homicide*, even *primâ facie;* because such an inference is not warranted by ordinary human experience, or the ordinary connection of facts with each other; and therefore an inference of its existence cannot be made "upon the first principles of justice." It is not consistent with the known principles of the law in relation to homicide itself, to make such an inference or implication as a natural presumption; for the malice does not exist, in contemplation of law, in justifiable homicide; it does not exist in excusable "intentional" homicide; it does not exist in that species of felonious homicide which is caused by sudden passion, occasioned by blows on the part of the deceased, or in cases arising from heat of blood in mutual combat; and no one, we think, will contend that these divisions of homicide do not comprehend a great proportion of the cases of homicide occurring in the world.

Still less can the implication be made as a natural presumption from the mere fact of the killing itself; for then the inquiry, whether its existence is according to human experience and observation, must embrace, in addition to the above, the two great classes of involuntary, excusable homicide, and involuntary, but careless, and therefore criminal, homicide, in which no such inference is drawn by the law.

We think we have sufficiently shown, that if a presumption of malice is to be raised from a voluntary killing, it cannot be as a natural presumption, but must be one made by the policy of the law. It has not been placed upon that ground, and cannot stand there; because such a presumption from such a fact is directly at variance with the known and acknowledged principles of humanity which have characterized criminal jurisprudence for nearly half a century, and which profess to regulate the administration of the law in cases of homicide equally with other offences.

It has been said many times, and by high authority, that so humane is the criminal law, that it deems it better that ten guilty persons should escape than that one innocent person should suffer. We are not prepared, however, to assent to that proposition. It would certainly be matter for profound regret that an innocent person should suffer; but the escape of ten guilty persons, let loose to commit depredations upon society, may be a much greater social evil, and therefore more to be deprecated by the law. Probably, however, no one will deny that, as a general social principle, as a sound principle of government, and of the criminal law, it is better that a criminal should escape than an innocent man suffer. And if this be true of offences generally, it will certainly be so when applied to the degrees of felonious homicide. It is better that one guilty of murder should be convicted of manslaughter, and punished by confinement in the State prison, than that one guilty of manslaughter only, should be convicted of murder, and suffer death. Perhaps the proportion of ten to one might hold good here. Assume that the proposition is sound when applied to equal numbers, and it furnishes an objection to a presumption of the existence of an essential characteristic of the higher crime through the policy of the law.

Again, there is an acknowledged maxim, a mere truism, of

the criminal law, — that every man is presumed to be innocent until he is proved to be guilty. Of what is the accused presumed to be innocent? The answer is: of the crime of which he stands charged, — of the whole crime; and if innocent of the whole crime, then of all its parts, — innocent of the malice as well as of the homicide. This, probably, will not be controverted. Now, it follows as a logical deduction, that when the law, in policy, presumes innocence of two things, it cannot permit the proof of one only to contradict its own presumption of innocence as to the other, unless the existence of that other is a natural inference from the proof of the first. The inference cannot be made from policy.

Again, the policy of the law in criminal cases requires that the proof which rebuts the presumption of innocence, shall establish the guilt of the accused beyond a reasonable doubt. It may be, that this principle does not date back so far as the time of Lord Hale. His maxim, *tutius semper est errare in acquietando quam in puniendo, ex parte misericordiæ quam ex parte justitiæ,* falls far short of it. We trace its appearance in the books, no farther back than *M'Nally's Evidence;* but it is now an unquestionable principle of criminal justice, and the policy of the law in other particulars must conform to it. The crime, — whatever is essential to the existence of the offence, — must be proved beyond a reasonable doubt. A reasonable doubt has been defined to be a doubt which a reasonable man would entertain. It may, perhaps, be better described by saying, that all reasonable hesitation in the mind of the triers, respecting the truth of the hypothesis attempted to be sustained, must be removed by the proof. We shall not stop to inquire how far the adoption of the principle is inconsistent with a legal presumption of malice, to be drawn by the court in any case. It may deserve inquiry, how far the law can make any presumption of the existence of any thing beyond a reasonable doubt; for that seems to address itself to the mind of the trier, upon the particular circumstances of the case. Be that as it may, whether the inference is to be drawn by the jury or the court, it can only be made from facts which have not only a natural tendency to lead to the inference, but from which the inference is to be drawn so clearly that the mind of the trier has no reasonable hesitation in believing the matter to be inferred. If the matter to be

inferred is malice, the proof from which it is to be inferred should be of some fact or facts which show something more than a disputable presumption of its existence. Now, the policy of the law cannot do this, unless it make the presumption conclusive. The presumption can only be made from something which has a natural tendency to lead to the belief so strongly as to remove the reasonable hesitation. And to this we may add the question, what trier, considering the matter as one of natural presumption, can say that from the mere proof of a voluntary homicide he has no reasonable doubt that it was committed without a sufficient excuse? So long as the facts proved are entirely consistent with the hypothesis, that the killing was justifiable, excusable, or unlawful only in the minor degree, the inference cannot be made beyond a reasonable doubt. But, as a matter of fact, it cannot be made even *primâ facie;* and although the fact of killing may be conclusively established, the crime of murder is not proved beyond a reasonable doubt.

A question has been made, whether the presumption of malice does not arise from a "secret killing;" and we observe that the reporter in the volume before us, giving a summary of the dissenting opinion of Mr. Justice Wilde in the case of York, states as the third proposition, "In case of a secret murder, where no provocation is proved, malice may be presumed." p. 603. This is a common form of expressing a settled opinion. But we have not understood from our former examinations of that case, that the learned judge maintained that doctrine; and upon a reperusal we do not now so understand it. If we apprehend him rightly, he only puts that as a possible matter, upon which he expresses no opinion. His own conclusions, as stated in the close of his opinion, certainly embrace no proposition of that character. If we are to infer from what is contained in the reporter's note, preceding his summary, that the learned judge has come to that conclusion, (and the language of the Attorney-General (p. 30) indicates that such is his belief,) we must regret it, for we think such a distinction as that would not have been sustained by his learned associates.

We do not, however, understand from the language of His Honor the Chief Justice, on page 548, that Mr. Justice Wilde now maintains that position. He doubtless concurred

in the rulings and instructions in Dr. Webster's case, regarding the principles as settled, by the decision in York's case, against his opinion; but those rulings and instructions do not put the case upon any implication of malice from the fact that the deed was done when no third person was present. Whatever may have been the ancient law, it seems very clear, that, if by the secrecy, be meant any thing else than contrivance to accomplish the homicide without the presence of third persons, any presumption arising from their absence can stand on no firmer ground, than a presumption from the mere fact of the homicide itself. If by "secret murder" be intended one accomplished, through contrivance, in the absence of witnesses, then that contrivance is to be shown before the fact is established, and being proved, would furnish quite as undoubted evidence of malice as that presented by any other premeditated homicide. It would be a monstrous proposition to make the presumption of malice depend upon the motions of third persons, over whom the accused had no control; and to raise the inference from the mere accidental absence of those, who, if present, might conclusively negative it. If such a presumption were raised, it should be, (using the language of Lord Holt, in Mawgridge's case,) "to show how necessary it is to apply the law to exterminate such noxious creatures" — as commit homicide without first calling witnesses.

We have entered into an extended examination of this subject, not because of any especial interest it possesses by reason of its connection with the case of Dr. Webster, but because of its general importance. The principles involved have an application to cases where the incidents attending the homicide may be less suspicious, but quite as difficult of proof, and where the transactions subsequent to it will be of a less revolting character.

It may, at first, seem, from the particular course of the argument, that the discussion is too exclusively legal in its character to entitle it to a place in our pages. But if courts are trammelled and hampered by precedents and decisions, legislators are free to shape the administration of criminal justice in such a manner as shall give to every man the full benefit of the presumption that he is innocent of crime in all its parts, until he is proved to be guilty, by facts which naturally establish the belief; and of the still more humane

principle, that the guilt of *all* that is necessary to constitute the crime of which he may be accused, of the malice as well as the homicide, shall be proved beyond a reasonable doubt, before he is made to suffer the penalty.

New York, by her Revised Statutes, enacted that the killing of a human being without the authority of law, "unless it be manslaughter or excusable, or justifiable homicide," as provided therein, should be murder in the following cases, namely, — 1. When perpetrated from a premeditated design, to effect the death of the person killed, or of any human being; 2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; 3. When perpetrated without any design to effect death, by a person engaged in the commission of felony. 2 *N. Y. Rev. Stat.* 657, [3d. ed. 746,] § 5.

Were the question an original one, we should certainly not feel disposed to carry the rule respecting the implication of malice beyond that expressed in *The State* v. *Smith*, 2 *Strobhart's S. Car. Reports*, 77. "If the act of a person which produces the death of another be attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, the law from these circumstances will imply malice without reference to what was passing in the person's mind, at the time he committed the act." It seems to us that this indicates a principle which will mete out the most equal and exact justice, and which would be most likely to be uniformly enforced by the verdict of juries.